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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1002

J. G. SAMARA, MICHAEL M. SAMARA, and CARROLL SAMARA,
Appellants,

VERSUS

STATE OF OKLAHOMA EX REL. THE OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

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April, 1965

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FACTS

Appellants in a condemnation case have appealed to this Court from a jury award of $140,000.00 and judgment requiring the Appellants to refund the amount of condemnation money paid in excess of the $140,000.00, which amounts to $41,175.00. The judgment of the trial court has been affirmed, the petition for rehearing and the second petition for rehearing have been denied and final judgment was entered by the Oklahoma Supreme Court on December 22, 1964. Appellants have filed notice of appeal to the Supreme Court of the United States on the grounds that

the Oklahoma statute providing for the taking of private property for public use is arbitrary, discriminatory, unreasonable, deprives Appellants of their property without due process of law and denies to them the equal protection of the laws, all in violation of the 14th Amendment to the Constitution of the United States.

ARGUMENT

The appeal from the Supreme Court of Oklahoma does not involve any federal question raised, or preserved in the Oklahoma Courts. A review of the record of the case reveals that the Appellants never raised the federal question they raise in their Jurisdictional Statement, *viz.*, the Oklahoma Statute (56 O.S. 1961, §§ 56-57), violates the 14th Amendment to the United States Constitution. Appellants cite as the question presented by their appeal: "Whether Fourteenth Amendment due process is violated by Title 66, Chapter 2, Oklahoma Statutes, as construed and applied in this case for the taking of the private property of appellants" (Jurisdictional Statement, page 2). Appellants cite as supporting the jurisdiction of the Supreme Court of the United States to review this decision, 28 U.S.C., § 1257(2), which provides for appeals when the question of the validity of a state statute is raised, and the decision of the state court is in favor of its validity. On the other hand, 28 U.S.C., § 1257(3), provides for review by certiorari where the question raised is whether a state statute denies to an appellant a title, right, privilege or immunity, guaranteed by the Federal Constitution. The argument of Appellants that the verdict of the jury in the trial court was not supported by the evidence; that compe-

tent evidence was erroneously excluded; that the plaintiff was guilty of misconduct; and, that the judgment is unconscionable, abusive, and arbitrary (Jurisdictional Statement, page 3), is an argument that the state statute, as applied to Appellants, violates the Federal Constitution and therefore constitutes a ground for a petition for a writ of certiorari rather than for an appeal. *Mergenthaler Linotype Co.* v. *Davis*, 250 U.S. 256; *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U.S. 1.

The validity of the Oklahoma Statute was raised for the first time in the Appellants' Notice of Appeal to the United States Supreme Court. The federal question must be presented and preserved in the state court before review may be had by the United States Supreme Court. It may be raised for the first time in a petition to the state court for rehearing, if the interpretation of the state court could not have been reasonably anticipated. *Wilson* v. *Cook*, 327 U.S. 474; *Southwestern Bell Telephone Co.* v. *State of Oklahoma*, 303 U.S. 206; *State of Missouri* v. *Gehner*, 281 U.S. 313; *Saunders* v. *Shaw*, 244 U.S. 317. In the case at bar, the question presented was not the repugnancy of the state statute to the Federal Constitution, but the value of the property taken, and whether or not this value was properly ascertained.

Appellants, proceeding pursuant to Section 1257(2), have not presented a substantial federal question, and have not properly raised the federal question which has not been passed on by the Oklahoma courts; hence no substantial federal question is presented.

Proposition I

Appellants cite, in their table on page 4 of their Jurisdictional Statement, the figure $151,932.00 as the lowest estimate of value any witness testified to. Examination of the figures used in the table discloses an error in arithmetic. The figures, as testified to by Mr. Askew, should total:

$ 40,000.00
42,512.00
31,840.00
6,960.00
20,000.00
$141,312.00

The correct total of $141,312.00 is more than ten thousand dollars less than the figure quoted by Appellants. The record reveals testimony of witnesses which total a value considerably less than that alleged by Appellants. Mr. J. Floyd Askew testified (C-M. 484-486) that he included in his valuation the sum of $6,690.00 for depreciated leasehold value in his total appraisal. There were two leases involved. The first (C-M. 315-316) contained an "option of first refusal" in Clause (6), and the second (C-M. 464-465) contained no economically beneficial options. The jury could have well concluded that the lease rentals were equal to the actual value of the lease, and that the lease had no economic value above the actual rentals, or that the leases had a value anywhere between zero and $6,690.00.

Mr. Askew's testimony (C-M. 524) reveals that he allowed $10.00 per square foot for the 5,314 square foot Sussy's building and $11.00 per square foot for the 3600

square foot Shangri-La building for a total of $74,192.00 after 20 per cent depreciation. Mr. John Bozalis testified that the Sussy's building could be newly built for as little as $6.00 per square foot and the Shangri-La building for as little as $7.00 per square foot (C-M. 529). Depreciated at the same 20 per cent, Mr. Bozalis' valuation would total $45,667.20 or $28,524.80 less than Mr. Askew's valuation.

Mr. Askew valued the real property at $400.00 per front foot, or $40,000.00 total, but he also testified (C-M. 514) that land similarly situated had recently sold for $300.00 per front foot. Appellants' witness, Mr. Harry L. Curtis, testified (C-M. 410) that there has never been any land situated similar to Appellants' land which has sold for over $300.00 per front foot (C-M. 410). Therefore, there was evidence that the real property on a front foot basis, was not worth over $30,000.00 or $10,000.00 less than the estimate of Mr. Askew.

The three foregoing examples alone ($6,690.00 excessive lease valuation, $28,524.80 excessive building valuation, and $10,000.00 excessive land valuation) yield a total of $45,-214.80 less than the $141,312.00 valuation by Mr. Askew, or a fair market valuation of $96,097.20. This figure is $43,-902.80 less than the $140,000.00 verdict of the jury.

Appellants assert that the testimony of Mr. Bozalis was improper since Mr. Bozalis based his testimony on buildings of primarily frame construction while Appellants' buildings were of concrete block sidewalls and brick. In addition, Appellants assert that Mr. Bozalis used the "rule of thumb" basis for determining the value of Appellants' buildings. Appellants assert that in determining the value

of the property taken, the property must be considered as a single unit.

That Mr. Bozalis was not mistaken as to the property involved is shown by the record. Mr. Bozalis testified that he inspected the buildings both prior to and during demolition (C-M. 528). The report of the Commissioners (C-M. 114-116, 190) referred to by Appellants (Jurisdictional Statement, page 5), shows that one of the buildings was constructed of concrete blocks with interior walls of frame and sheet rock construction. The second building was constructed of part concrete slab and part conventional wood flooring, tile brick, and interior walls of fiberboard and plywood. Both buildings had roofs constructed over a wood deck. Mr. Bozalis, in addition to stating that he had inspected the buildings before and after demolition, stated (C-M. 527) that part of the construction was masonry and concrete blocks. The report of the Commissions shows that the buildings contained both block and frame construction. It is noted that no objection was made to Mr. Bozalis' expertise, or his identification of the buildings at the trial.

Mr. Bozalis testified as to the cost of construction of buildings such as were owned by Appellants in 1961, based on a square foot cost. The court expressly instructed that the testimony would be admitted, not as the test for determining the fair market value, but for the purpose of throwing light on the fair market value, and for no other purpose (C-M. 528). Mr. Bozalis testified that his estimate was based only on the building, and not on the furniture and fixtures contained therein, or the amount of money the property was capable of earning (C-M. 532-533). Far from using the square footage reconstruction cost less de-

preciation as the fair market value of the property, Mr. Bozalis made it perfectly clear from his testimony, and the court by its admonition to the jury, that the testimony was only one of the considerations in determining the fair market value of the property. The court instructed the jury that the "* * * 'fair market value' is the amount of money for which an owner would sell, though under no obligation to sell, and which sum a purchaser would pay, though under no obligation to buy" (C-M. 585).

In *Driver* v. *Oklahoma Turnpike Authority*, Okla., 343 P.2d 1079, the case was reversed and remanded because the trial court did not permit proof of replacement cost and original cost of dairy buildings on the remaining land, quoting from *State ex rel. Department of Highways* v. *Weaver*, Okla., 297 P.2d 549, which holds:

> "* * * evidence may be admitted of *specific* elements which contribute to the depreciation in market value."

The measure of damages in this case is the fair market value of the property at the time it was taken. That value is determined by considering all the elements that relate to such value. 4 Nichols on Eminent Domain, § 12.2.

Buildings or other improvements might either enhance or diminish the value of the land; but in this case, all the parties appeared to agree that the improvements were beneficial to the land. Hence, the reproduction cost of the improvements bore a reasonable relationship to the total value of the premises, and could be properly considered in determining total value.

Appellants' witness, Harry L. Curtis, testified on direct examination:

> Q. "Tell me what all did you take into consideration, *what all did you appraise* in making your appraisal? * * *
>
> A. The land, *the buildings*, and the lease, * * *."

And on cross-examination:

> Q. "Now, Mr. Curtis, in valuing these buildings and the leasehold estates, just what did you take into consideration with reference to the buildings? * * *
>
> A. *The cost of reproducing the building new and depreciating it.* * * *
>
> Q. Did you just take into consideration the walls, floor and roof?
>
> A. I just took the square foot cost * * *."

And Appellants' witness, Russell E. Swan, testified as follows:

> Q. "* * * what did you do in order to make this appraisal, what work did you go through?
>
> A. * * * First of all, the first thing in any appraisal is to establish an estimate of land value. * * *
>
> So, first, I established what, in my opinion, was the highest and best use. * * * and came up with an estimate of value for the land.
>
> Then, on the improvements, * * * their value is going to be based on one of three things. First, what we call our cost approval. *I estimate what it should cost to reproduce* these improvements today if they were new. * * *

> Then, from this figure I would deduct the depreciation * * *.
>
> This cost, just of the improvements, I add it to the land value and come up with an indication of value by the cost approach * * *."

Therefore, Appellants first injected "reproduction cost" into the trial, on the apparent theory that the buildings enhanced the value of the land, and that their intrinsic value should be considered in determining total value. Appellees were entitled to rebut this evidence by showing the buildings could be reproduced for a lesser sum.

Appellants contend that the trial court's Instruction No. 2 to the jury failed to include as an element of damages any personal property except that which was on the Dickson property. The Oklahoma Supreme Court found, and Appellees hereby contend, that any omission of Instruction No. 2 was covered by Instructions Nos. 8 and 9 (C-M. 587-589).

Proposition II

Appellants' second proposition relates to the exclusion of a purported "admission against interest" of the Capitol Improvement Authority, which Appellants contend was admissible.

The testimony of Appellants' witness, Mr. Swan, and the offer of proof, appeared in the record as follows (C-M. 426-430):

> Q. "* * * do you have an opinion as to the fair market value as of June 8, '61, of all those things combined?

A. I have.

Q. What is that opinion, please, sir?

A. * * * the total estimate of the market value of the real estate plus the personal property is $351,544.

Q. Now when did you make this appraisal for Mr. Samara?

A. My effective date of my *original* appraisal was December 20th of 1960.

Q. Would there be any difference in your valuations as of that time and * * * [June 8th] whatever the date is?

* * * * * *

A. No, sir. That is why I hesitated a minute ago, I wanted to check and make sure.

Q. Now, after you made this appraisal, did you furnish it to the Capitol Improvement Authority, and in fact, have a meeting with the Board and discuss the appraisal with them?

A. I personally did not furnish them a copy of my appraisal, but my appraisal was furnished to them by an attorney representing Mr. Samara, and I met with the Capitol Improvement Authority. Senator Gene Stipe and I met, representing Mr. Samara, and I believe there was about six or seven other persons in the room all representing the Capitol Improvement Authority, and we went with them for the purpose of going over my appraisal with them and explaining it to them.

Q. Now, about when was this?

A. I don't have the date here with me. I have the exact date in my file at my office, but I do not know the date at this time.

Q. As near as you remember it?

A. Oh, I—well, since this has been going on since 1960, and it is one of many cases that I have been on, I just can't—as I remember it, it was the 27th day of some month, but what month I couldn't tell you.

Q. All right, sir. In that meeting, I presume that you explained your appraisal to the members of the Authority?

A. Yes, sir.

The sole purpose of my—of that meeting, so far as I understood it and all that went on while we were there, we went page by page through my appraisal and I explained every step and how we arrived at—how I arrived at this estimate of value.

Q. Yes. If you can remember, who was presiding over that meeting, if you know?

A. I don't remember the name of the person presiding. At that time when I met with the Authority, that was my first introduction to the Authority.

The only person that I remember for sure was Mr. Robert Wheeler, the attorney who looked on my appraisal with me, sat next to me and shared my appraisal with me.

As I understand, the person in charge of the meeting was the Chairman of the Capitol Improvement Authority, but not knowing anyone by name at that particular time and I wasn't concerned with names as such, I just couldn't tell you by name.

Q. The Mr. Wheeler you mentioned awhile ago is another attorney representing the Improvement Authority.

Is that correct?

A. As I understand it, he was their attorney at that time. Whether he was their head attorney or not, I don't know.

Q. Was there any conversation between you and whoever was presiding over that meeting?

Mr. Harris: Your Honor, we object to this.

The Court: That will be sustained.

None of this has been material to this lawsuit but you haven't objected.

Mr. Powers: Your Honor, I think that this might be a matter of admissions against interest on the part of the presiding officer.

The Court: There isn't any such thing as against the State.

Mr. Powers: This is not the State, Your Honor.

The Court: There isn't any such a thing as against the Capitol Improvement Authority either then.

The objection will be sustained and an exception allowed.

(The following occurred outside the hearing of the jury:)

Mr. Powers: Come now the defendants and offer to prove that the presiding officer for the Capitol Improvement Authority at the meeting referred to by Mr. Swan told Mr. Swan that the appraisers for the Authority agreed with his appraisal except for the rights or interests that were being appraised.

The Court: That will still be sustained, and exception allowed.

Mr. Powers: Note our exception.

(The following occurred back in the hearing of the jury:)

Mr. Powers: I believe that's all."

The foregoing discloses that the Appellants undertook to prove that Mr. Swan heard an unidentified person, who he *understood* was Chairman of the Authority, at a meeting of six or seven persons *representing* the Authority, say that the appraiser for the Authority (who was also unidentified) agreed with Mr. Swan's *original* appraisal—not necessarily the appraisal heard by the jury.

73 O.S. 1961, § 152(e), provides in part as follows:

"* * * Three (3) members of the Authority shall constitute a quorum and *the vote of three (3) members shall be necessary for any action taken by the Authority* * * *."

And 73 O.S. 1961, § 161, provides in part as follows:

"In addition to all other powers expressly conferred, *the Authority is hereby authorized* and empowered:

* * * * * *

"(d) To acquire, hold and dispose of real and personal property in the exercise of *its* powers and the performance of *its* duties under this act.

"(e) To acquire by purchase or otherwise * * * such * * * property * * * as *it* may deem necessary * * *.

"(f) To make and enter into all contracts and agreements * * *.

* * * * * *

"(j) To do all things necessary or convenient to carry out the powers expressly granted in this act."

The foregoing demonstrates that neither the Chairman nor any other member of the Authority was authorized to bind the Authority or make any admissions binding on the Authority. The concurrence of at least three members thereof was necessary to bind the Authority.

> "Statements of a public officer in the absence of express authority are not competent against the national or a state government or agency thereof; and while in some instances the declaration of an official may constitute an admission of the federal or state government or agency, even where the necessary authority is conferred the statement is admissible only if it was made within the scope of such authority, and contemporaneously with the event or transaction involved." 31A C.J.S., Evidence, § 359.

It is noted that the Appellants did not prove or offer to prove either the identity or authority of the declarant. It is further noted that the declaration was made during negotiations had with an obvious view to settle and compromise the case. The applicable rule is stated in *Benzel v. Pitchford*, 206 Okla. 672, 674, 245 P.2d 1131, 1133 [8], as follows:

> "* * * The evidence elicited in his cross-examination tended to show that defendant had made a solemn admission under oath, accompanied by the tender of $1,350, to the effect that he did not know whether he owed plaintiff the commission or not. * * * but such admission was made for a special purpose and when that special purpose failed the defendant should not have been embarrassed in the trial of the cause by introdu tion of such statement or admission. The statements or admissions here involved were somewhat akin to statements and admissions made in or in con-

nection with an effort at compromise, and such statements upon failure of the compromise efforts are not admissible in subsequent trial of the cause * * *."

It is also noted that Appellants did not prove or offer to prove any attempt to subpoena the declarant or obtain his deposition. *Moral Insurance Company* v. *Fechtel*, Okla., 280 P.2d 716, 717, holds as follows:

> "* * * The record does not show any proper or sufficient attempt by Moral to obtain the presence or deposition of Roof for the trial. In 20 Amer. Juris., Evidence, Sec. 556, the general rule is stated that declarations against interest are not admissible if the declarant is available as a witness."

Lastly, Appellants did not prove or offer to prove Mr. Swan's *original* appraisal was the same, or nearly the same, as the final appraisal he testified to at the trial—the record does not disclose the amount of the appraisal involved in the purported declaration.

Proposition III

A

The third proposition contends Appellee was guilty of misconduct in two particulars, the first being that Appellee brought a large mural into the courtroom, forcing Appellants to object. Appellants say this caused the jurors to think the mural, which they never saw, was indecent or obscene.

The mural was a wall decoration which had hung in the front (west) part of Sussy's restaurant (C-M. 574), and Appellee attempted to have the same identified by the wit-

ness, Frank Boyer. The court sustained Appellants' objection to the proceedings, and the mural was taken from the courtroom.

Appellants' Exhibit D-52 (C-M. 332-337) was an inventory of the Sussy's property showing the claimed value of each item, in which the following entries appear (C-M. 333):

"Murals Painted on Walls 550.00"

Mr. Samara was asked the following question regarding said Exhibit D-52, and gave the following answer (C-M. 321):

"Mr. Harris: If you were testifying to the value of these various articles that you have listed on it, would your testimony be the same as you have listed after each article as of June 8, 1961?

A. There would be a very slight reduction for depreciation from the period of February, 1961, to June—from February, 1961, to June, 1961."

Appellants, therefore, injected the murals and their value into the trial as issues. The witness, Mr. Gerald Carlile (C-M. 545-572), placed a lower value on said murals as shown by Plaintiff's Exhibit P-25 (C-M. 559-562), containing the following entries (C-M. 560):

"Sussy's—*West Room*

"* * *

"5 ea. Wall Murals 4′ x 12′ Oil Paintings)
" " 4′ x 38″ " ") 150.00"

And Mr. John Bozalis (C-M. 525-533) testified as follows (C-M. 532):

Q. "The mural on the walls and things of that nature?

A. Yes.

Q. You did include those?

A. I would those particular murals because they were no more than a good paint job."

It appears, therefore, that the quality and value of the murals were disputed issues in the trial, and said issues were raised by Appellants. The record does not disclose the reason for Appellants' objection to admitting the murals in evidence; it is not shown that the murals were indecent or obscene, nor does anything appear in the record to warrant the inference that the jury would conclude they were indecent or obscene.

B

The gist of Appellants' second contention of misconduct is:

> "In interrogating Jake Samara, the principal owner of the property, counsel for appellee asked him if he had not signed documents under penalty of perjury that his total cost of equipment in Shangri-La was $18,599.48, and that he had depreciated it through 1960 to $16,416.23. Counsel for appellants objected to this line of questioning, which objection was sustained. The appellee well knew this line of questioning was not admissible, but by forcing the objection, the prejudicial implication was made that there was something being concealed, and that Samara had made false income tax returns."

Appellant Jake Samara testified on direct examination as follows (C-M. 273):

Q. "Was that a profitable business so far as you were concerned, Jake?

A. Yes, sir. It was very profitable."

And (C-M. 319):

Q. "What is your opinion as to the value?

A. Well, not including anything for goodwill and loss of earnings, I base the cost of $430,000."

The cost of the properties and whether the businesses were profitable were proper subjects for inquiry on cross-examination—these issues having been raised on direct examination.

Briefly stated, the cross-examiner incorporated specific figures in his questions and asked Mr. Samara if his records did not show such figures to be true, or whether he had not signed statements that the such figures were true. Mr. Samara consistently denied they were true or that he had ever signed such statements.

Notwithstanding his sworn testimony, he swears in his affidavit (attached to the Amendment to Motion for New Trial, C-M. 609) that the figures are identical, or nearly so, to those on his 1959 and 1960 income tax returns. It is not specified whether he refers to State or Federal returns or both, and no returns or copies thereof are attached to the affidavit in support thereof.

He further swears (in said affidavit) that the figures on said returns were not available from any source other than his tax returns (in turn, available only to himself and his tax attorney); this, in spite of his testimony as follows (C-M. 350):

Q. "Now, did you—do you keep books and records of these things?

A. No, sir.

I have a certified public accountant who keeps them."

Appellants then reason that since, according to the affidavits, the information must have been obtained from tax returns, and the use thereof was a violation of privilege, and since such use of the figures was an implication "* * * that Samara had made false income tax returns," the 14th Amendment has been violated.

Application of Unbach, Okla., 350 P.2d 299, 301, holds:

> "* * * once a person had made the amount of his income an issue in litigation it becomes a legitimate subject of inquiry and he can no longer claim that the information contained in his returns is confidential."

When Mr. Samara testified to matters contradicted by his tax returns, he waived any privilege that may have existed before he rendered the information contained in said returns relevant and material to the issues in the case. The court could have ordered him to produce said returns or copies thereof. But even so, it has not been shown that any tax returns were mentioned to the jury or used by the cross-examiner. So far as the jury could know, the cross-examiner had no basis for the figures used. The fact that there was no follow-up more probably prejudiced Appellees in the eyes of the jury.

Proposition IV

Appellants contend that the totality of errors committed by the state courts results in a deprivation of due process under the 14th Amendment. Appellees contend that the errors alleged by Appellant, as shown by the record itself, simply do not exist. The jury awarded Appellants $43,902.80 more than the lowest figures testified to by the witnesses. The allegation that Mr. Bozalis testified to square footage replacement value, which was considered by the jury as the fair market value of the total property taken, is refuted by the record itself; the admonition of the trial court to the jury, and by the instructions given. There is no basis for the contention that the proffered mural prejudiced the Appellants, and the allegation that the jury inferred the mural was obscene is mere speculation. The allegation that the exclusion of a purported conversation between Appellants' witness and a third person who was supposedly a member of the Capitol Improvement Authority was prejudicial is also unsupported since Appellants failed to show who the conversation was with, and at any rate, as a matter of law, the third party was totally without authority to bind the Authority and the State in any manner whatsoever. The Appellants' allegation that the Appellees wrongfully questioned Mr. Samara about his income tax returns is again unsupported by the evidence since the record does not show where the figures came from, and that Appellant had waived any privilege that he may have had in the first instance by opening the subject of his income. The final allegation that the totality of errors amounted to a deprivation of due process under the

14th Amendment must necessarily fall since the purported errors simply do not exist.

CONCLUSION

For the above reasons, Appellee submits that the Motion to Dismiss or Affirm be granted.

Respectfully submitted,

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April, 1965